No. 85-1513

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, in his Official Capacity as Governor of Louisiana, WILLIAM J. GUSTE, JR., in his Official Capacity as Attorney General of Louisiana, LOUISIANA DEPARTMENT OF EDUCATION, and THOMAS G. CLAUSEN, in his Official Capacity as Superintendent of Education of Louisiana,

Appellants,

v.

DON AGUILLARD *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

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OPINION OF U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DON AGUILLARD, ET AL	CIVIL ACTION
VS.	NO. 81-4787
DAVID C. TREEN, GOVERNOR, ET AL	SECTION H

REASONS FOR JUDGMENT
[Filed January 10, 1985, Unpublished]

[DUPLANTIER, U.S. DISTRICT COURT JUDGE:]

At its 1981 regular session, the Louisiana Legislature added a new sub-part to Louisiana's "General School Law," applicable to all public secondary and elementary schools, entitled "BALANCED TREATMENT FOR CREATION-SCIENCE AND EVOLUTION-SCIENCE IN PUBLIC SCHOOL INSTRUCTION." The statute is reproduced in full in the addendum. It requires Louisiana public schools to "give balanced treatment to

creation-science and to evolution-science;" "[b]alanced treatment of these two models shall be given in classroom lectures ..., and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe." Creation-science and evolution-science are separately defined in identical language as "the scientific evidences for creation (evolution) and inferences from those scientific evidences." "Balanced treatment" requires that each school provide "whatever information and instruction in both creation and evolution models a classroom teacher [2] determines is necessary and appropriate to provide insight into both theories." No school is required to give any instruction in the "subject

of origin," but if a school chooses to teach about either evolution-science or creation-science, it must teach both, and it must give each balanced treatment. The statute prohibits discrimination against any teacher "who chooses to be a creation-scientist or to teach scientific data which points to creationism."1

A number of plaintiffs, including parents of Louisiana public school students, as well as educators, taxpayers, and religious leaders, seek to enjoin implementation of the "Balanced Treatment" statute as a violation of the First Amendment's Establishment Clause. Defendants, Louisiana officials charged with the duty of implementation of the statute, have agreed to take no [3] action toward imple-

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1. No mention is made of discrimination against teachers of evolution.

mentation pending the final outcome of this litigation.2

Plaintiffs moved for summary judgment, contending that there is no genuine issue as to any material fact and that as a matter of law the statute violates the Establishment Clause as interpreted by the United States Supreme Court and the Fifth Circuit Court of Appeals.

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2. Earlier, this court held that the statute violated the state constitutional grant of authority over the public school system to the Board of Elementary and Secondary Education. We suggested that that issue should be certified by the Fifth Circuit to the Louisiana Supreme Court for its decision before any federal court intervention on First Amendment grounds. Defendants appealed, and the Fifth Circuit Court of Appeals certified the question to the Louisiana Supreme Court. Aguillard v. Treen, No. 82-3778 (March 14, 1983). In a 4-3 decision, the Louisiana Supreme Court held that the statute did not violate the Louisiana Constitution. Aguillard v. Treen, 440 So.2d 704 (La. 1983). The Fifth Circuit then remanded for this court to consider the First Amendment challenge.

There is no doubt that the defendants could produce a great deal of evidence on collateral issues, as did the proponents of a similar Arkansas statute during ten days of a federal court trial which resulted in a declaration of unconstitutionality. McLean vs. Arkansas Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982). Indeed, in opposition to the summary judgment motion defendants have filed well over one thousand pages of memoranda and summaries thereof and affidavits, all [4] dedicated primarily to a discussion of the anticipated evidence.

We are convinced that whatever that evidence would be, it could not affect the outcome. We decline to put the people of Louisiana to the very considerable needless expense (including fees of attorneys on both sides) of a protracted trial. We hold that the case is ripe for

summary judgment. Bound as we are by the Constitution as interpreted by the Supreme Court and the Fifth Circuit Court of Appeals, we declare Act 685 of the 1981 Regular Session of the Louisiana Legislature to be unconstitutional and enjoin its implementation.

Both sides seek comfort from recorded statements of proponents and opponents, from various committee hearings, from drafts of earlier proposals and bills, and from amendments to the original bill before it was finally enacted. The plaintiffs maintain that all of this "history" [5] points to a religious purpose for and effect of the statute; with equal (and much lengthier) fervor, defendants contend the opposite: the history shows that religion is not involved. All of this "history" is of little or no effect. The statute is not ambiguous; it means what

it says.

Defendants contend that summary judgment is precluded by the presence of at least one genuine issue of material fact, the definition of "science." We decline the invitation to judge that debate. Whatever "science" may be, "creation," as the term is used in the statute, involves religion, and the teaching of "creation-science" and "creationism," as contemplated by the statute, involves teaching "tailored to the principles" of a particular religious sect or group of sects. Epperson v. Arkansas, 393 U.S. 97, 106, 89 S.Ct. 266, 271 (1968). As it is ordinarily understood, the term "creation" means the bringing into existence of mankind and of the universe and implies a divine creator. While all religions may not teach the existence of a supreme being, a belief in a supreme being a crea-

tor) is generally considered to be a religious tenet.

[6] The state may not constitutionally prohibit the teaching of evolution in the public schools, for there can be no non-religious reason for such a prohibition. The First Amendment "forbids alike the preference of a religious doctrine or the prohibition of theory whcih is deemed antagonistic to a particular dogma." Id. at 106-107, 89 S.Ct. at 271-72. If the state cannot prohibit the teaching of evolution, manifestly it cannot provide that evolution can be taught only if the evolution curriculum is "balanced" with a curriculum involving tenets of a particular religious sect. See Wright v. Houston Independent School District, 366 F.Supp. 1208 (S.D. Tex., Houston Division 1972), aff'd, 486 F.2d 137 (5th Cir. 1973).

Because the statute requires the

teaching of creation-science if a school teaches a subject the teaching of which the state cannot constitutionally prohibit, we treat the statute as if it simply mandates the teaching of creation-science. Just as the sole reason why the Arkansas legislature prohibited the teaching of evolution [7] was that it is deemed to conflict with a particular religious doctrine (Epperson, supra), so too the sole reason why the Louisiana legislature would require the teaching of creationism is that it comports with the same religious doctrine. There can be no legitimate secular reason for the "Balanced-Treatment for CreationScience and Evolution-Science Act."

We are mindful, of course, that the issue is not whether the statute is meritorious, or whether it enjoys popular support. We are also mindful that any act

passed by the state legislature is presumed to be onstitutional, and that a court should declare a statute which is not self-implementing facially unconstitutional only if under no circumstances can it be applied in a constitutional manner. See Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925); Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476 (1965). We have carefully considered whether the Louisiana public school system could implement the "Balanced-Treatment Act" in a manner that would not offend the Establishment Clause. We conclude that it could not do so.

Arguably, a public school curriculum could give balanced treatment to evolution and creationism without advocating the latter. A study of the Bible for its [8] literary and historic qualities only would not involve advocacy of its content. A study of comparative religion

or history of religion could be conducted without advocating the beliefs of any particular religious sect. Curricula such as those would be constitutional. (See School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573 (1963)). However, it is clear that the statute under consideration does not contemplate mere objective exposure of the creationism concept as part of a secular program designed to educate students concerning various theories of the origin of man and the universe.

In considering whether the "Balanced Treatment Act" violates the Establishment Clause of the First Amendment, we make the same acknowledgment as did the Supreme Court in the oft-cited Lemon opinion: "Candor compels acknowledgement . . . that we can only dimly perceive the

lines of demarcation in this extraordinarily sensitive area of constitutional law." Lemon v. Kurtzman, 403 U.S. 602 at 612, 91 S.Ct. 2105 at 2111 (1971). The following three-part test is applied in Lemon:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion." Id. at 612-13, 91 S.Ct. at 2111.

[9] The Court has not, however, adhered rigidly to the Lemon test. We quote from the recent nativity-scene opinion: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." Lynch v. Donnelly, _____ U.S. _____, 104 S.Ct. 1355, 1362 (1984). Another view is that the First Amendment does not prohibit governmental activity of a religious

nature so long as the activity is neutral to all religions.3 One conclusion seems clear: the meaning of the First Amendment is not set in constitutional stone.

Whether one applies the "three-pronged" test of Lemon, the less rigid analysis of Lynch, or the views of those who contend that the First Amendment does not prohibit neutral state activity of a religious nature, the Louisiana statute violates the establishment clause. Because it promotes the beliefs of some theistic sects to the detriment of others, the statute violates the fundamental [10] First Amendment principle that a state

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3. "[T]he Constitution guarantees freedom of religion, but should not be construed to guarantee freedom from religion." Unpublished Reasons for Judgment of this court, reversed by a divided panel of the Fifth Circuit, Karen B. et al v. Treen, et al No. 804774 (E.D. La. January 8, 1981), rev'd 653 F.2d 897 (5th Cir. 1981) (emphasis in original).

must be neutral in its treatment of religions. The First Amendment, as applied to the state by the Fourteenth,4 provides that the state "shall make no law respecting an establishment of religion." "The Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act" is a "law respecting an establishment of religion." [Appendix omitted consisting of Balanced Treatment for Creation-Science and Evolution-Science Act, which is reproduced in Appendix F.]

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4. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 ¶1940).

CERTIFICATE OF SERVICE
(Pursuant to S.Ct.R. 28.5(b))

I hereby certify, as a member of the bar of the Supreme Court of the United States, that on this 25th day of March 1986, three copies of the jurisdictional statement and a statement concerning first class mailing, were served by first class mail (* one by Federal Express) with the envelope duly addressed and with postage prepaid to the attorneys of record of all other parties of record as follows:

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I further certify that service is not required on any other persons, and that all parties required to be served have been served. Rule 28.

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